Supreme Court, U.S.
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No. 95-1758

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAMS NATURAL GAS COMPANY,

Petitioner,

v.

TALUS PROPERTIES LIMITED PARTNERSHIP, PRIMA OIL AND GAS COMPANY, JOHN P. LOCKRIDGE, YUMA COUNTY OIL COMPANY, AND JER PARTNERSHIP,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.1 LIST OF CORPORATIONS AND SUBSIDIARIES

Respondent Prima Oil and Gas Company is a wholly owned subsidiary of Prima Energy Corporation. Respondent Yuma County Oil Company has no parent company and no subsidiaries.

Respondent Talus Properties Limited Partnership is a limited partnership and not a corporation within the scope of Rule 29.1. Respondent JER Partnership is a partnership and not a corporation within the scope of Rule 29.1. Respondent John P. Lockridge is an individual.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Talus Properties Limited Partnership, Prima Oil and Gas Company, John P. Lockridge, Yuma County Oil Company, and JER Partnership, file this opposition to the Petition of Williams Natural Gas Company ("WNG") for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

SUMMARY OF ARGUMENT

This case presents no constitutional issues and no federal statutory interpretation questions are involved. This is a diversity case involving the interpretation of one clause of three identical Contracts in which the district court ruled on summary judgment that the provision in question was unambiguous. Having so ruled, the district court interpreted the unambiguous language of the Contracts as a matter of law. A panel of the United States Court of Appeals for the Tenth Circuit, without oral argument, unanimously affirmed the district court's summary judgment ruling in an unpublished opinion. There is no split in the circuits, nor is one likely. And, despite Petitioner's unfounded claims to the contrary, there is no compelling public policy reason for this Court to review the judgment of the Tenth Circuit. Accordingly, the Petition for Writ of Certiorari should be denied.

RESPONSE TO PETITIONER'S ARGUMENT

Petitioner propounds two arguments in support of its Petition for Writ of Certiorari:

(1) an unfounded attempt to attach precedential and policy significance to the decision below that is totally lacking;[1] and

(2) a rehash of Petitioner's substantive arguments unanimously rejected by a panel of the Tenth Circuit.[2]

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[1] Petition for Writ of Certiorari at 6-10.

[2] *Id.* at 10-26. In accordance with Rule 15.2, Respondents object to Petitioner's characterization of the law as applied by the Tenth Circuit, and to Petitioner's characterization of references in prior judicial proceedings to the primary term of the contracts as supporting Petitioner's position. *See* Petition for Writ of Certiorari at 19-21. The Petitioner also mischaracterizes the law in its claim relating to the absence of ambiguity in the contract language, and in Petitioner's claim relating to the Tenth Circuit's refusal to consider Petitioner's reformation arguments. *See* Petition for Writ of Certiorari at 11-18 and 24-26, respectively.

For the reasons given by the Tenth Circuit, that court did not err in refusing to consider the extrinsic evidence proffered by Petitioner; nor did the Tenth Circuit err in addressing and rejecting Petitioner's reformation claim. The remainder of this brief will respond to Petitioner's policy argument. Respondents reserve the right to further respond to Petitioner's substantive arguments on the merits if the writ of certiorari is granted.

The one issue raised in the Petition that might be relevant to whether this Court should grant the requested writ is whether the decision of the Tenth Circuit threatens to undermine the natural gas pipeline industry restructuring initiative of the Federal Energy Regulatory Commission ("FERC") in Order No. 636.[3]

Contrary to Petitioner's claim, the decision below does not threaten the fabric of restructuring; nor does the decision of the Tenth Circuit have the precedential potential to undermine the economic assumptions on which the restructuring initiative of the FERC is founded.

During calendar year 1995, 18,706 million Mcf of natural gas was produced domestically.[4] Under the contracts at issue in this case, approximately 1.7 million Mcf of gas was sold during

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[3] Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol [hereinafter "Order No. 636"], 57 Fed. Reg. 13267 (April 16, 1992), III FERC Stats. & Regs. Preambles ¶ 30,939 (April 8, 1992), *reh'g granted and denied in part,* Order No. 636-A, 57 Fed. Reg. 36128 (August 12, 1992), III FERC Stats. & Regs. Preambles ¶ 30,950 (August 3, 1992), *order on reh'g,* Order No. 636-B, 57 Fed. Reg. 57911 (Dec. 8, 1992), 61 FERC ¶ 61,272 (1992).

[4] Department of Energy, Energy Information Administration *Monthly Energy Review,* March 1996, Table 4.1, column 8. The term "Mcf" is a volumetric unit of measurement equal to one thousand cubic feet.

this same period.[5] Therefore, the gas sold under these Contracts comprises less than one ten-thousandth of the nation's domestic natural gas supply. In dollar terms, the comparison is equally profound: the wellhead cost of the gas sold under these Contracts (approximately $11.6 million)[6] is less than four ten-thousandths of the $29.7 billion aggregate wellhead cost of domestic natural gas purchased during the same period.[7] These figures demonstrate that the quantity of natural gas sold under these Contracts is so minuscule, in the context of the national market, that the pricing of the natural gas under these Contracts has no significant impact on the structure of the national natural gas industry. Thus, Petitioner's claim that the Tenth Circuit's decision represents a threat to the economic assumptions on which FERC based its restructuring orders is unfounded.

In implicit recognition of the minuscule direct impact of these Contracts on the national market for natural gas, Petitioner suggests the precedential effect of the Tenth Circuit's decision could portend greater indirect economic consequences.[8] Petitioner's contention is unfounded for three reasons. First, by the Tenth Circuit's own rules, the unpublished decision below is not intended to have precedential effect.[9] Second, the

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[5] Affidavit of Floyd Trujillo, ¶5 and Affidavit of Joel Rothman, ¶¶4 and 5 (Appendices B and C, respectively). Petitioner's argument concerning the alleged macroeconomic significance of the decision below to natural gas markets is made for the first time before this Court. Accordingly, the record below is devoid of factual matter relating to the relative insignificance of the quantity of natural gas sold under the contracts involved in this case, necessitating Respondents' reliance on the cited affidavits.

[6] *Id.*

[7] *See* Department of Energy, Energy Information Administration *Monthly Energy Review,* March 1996, Table 4.1 and 9.11. Derived by multiplying the 1995 average domestic natural gas wellhead price of $1.59 per Mcf (Table 9.11, column 2) by the 1995 total domestic dry gas production of 18,706 million Mcf (Table 4.1, column 8).

[8] Petition for Writ of Certiorari at 7.

[9] *See In re Citation of Unpublished Opinions/Orders and Judgments,* 151 F.R.D. 470 (10th Cir. Nov. 29, 1993).

bulk of the costs associated with the changes in the natural gas industry occasioned by deregulation were incurred prior to Order No. 636,[10] evidencing the fact that most interstate pipelines, including Petitioner, have successfully renegotiated or bought-out the great majority of their long-term gas supply contracts. As a result, the likelihood is small that the issues presented in this case would arise in numerous other cases in other circuits so as to potentially influence the structure of the national natural gas market. Third, the lower courts' rulings in this case are extremely fact-specific, turning on the peculiar language of these Contracts. The contract language at issue in this case appears to have been unique to Petitioner's contracts, and the three Contracts involved in this case are the only contracts of Petitioner still in effect that contain the language in question.[11] Therefore, there is no significant risk that the Tenth Circuit's decision in this case will be followed in other circuits in a manner that would warrant intervention by this Court at this time.

Nor is there merit to Petitioner's contention that the continuation of its contractual obligations for an indefinite (but not unlimited) period of time threatens the viability of the FERC's restructuring policies.[12] As Petitioner indicated,[13] in Order No. 636,[14] and in subsequent orders implementing restructuring on

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[10] *Compare* Order No. 636 at p. 30,643 (interstate pipelines filed to recover nearly 10 billion dollars under FERC Orders No. 500 and 528) *with* Appendix B to Brief of the Federal Energy Regulatory Commission, *United Distribution Companies v. FERC,* No. 92-1485 (D.C. Cir. June 6, 1995) (interstate pipelines had filed to recover about $1.355 billion as GSR costs under Order No. 636 as of May 10, 1995). *See also* Graph at Appendix A, p. A-2, indicating decline in pipeline filings to recover Order No. 636 restructuring costs following peak in the 4th Quarter of 1993.

[11] *Williams Natural Gas Co.,* 73 FERC ¶ 61,367, at p. 62,155 (Dec. 22, 1995).

[12] Petition for Writ of Certiorari at 8.

[13] *Id.* at 8, n.4.

[14] Order No. 636, III FERC Stats. & Regs. Preambles ¶ 30,939, at 30,457-59 (1992).

individual pipelines,[15] the FERC has established mechanisms whereby interstate pipelines are able to recover the cost of restructuring from their customers. These costs include Gas Supply Realignment ("GSR") costs associated with long-term gas supply contracts, such as those involved in this case, that are no longer required by the pipeline in light of restructuring.[16] Thus, the FERC has already taken steps to safeguard against the economic consequences conjured by Petitioner.

Moreover, Petitioner grossly overstates the potential for these consequences to continue indefinitely. In the order approving Petitioner's restructuring, the FERC approved pass-through by Petitioner to its customers of Petitioner's GSR costs under a Price Differential Mechanism.[17] Essentially this mechanism allows Petitioner to resell, at spot-market prices, the above-market priced gas Petitioner is obligated to buy under these Contracts. Initially the FERC approved Petitioner's Price Differential Mechanism for a period of two years.[18] More recently, at Petitioner's request, the FERC extended this mechanism for an additional two years, until October 1997.[19] There is no assurance, or even a likelihood, that the FERC will extend Petitioner's Price Differential Mechanism beyond October 1997, however. Thus, the long-term consequences to the FERC's restructuring program raised by Petitioner are speculative at best. Moreover, the FERC is quite able to prevent an indefinite perpetuation of the consequences about which Petitioner complains. Thus, these

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[15] *E.g., Texas Eastern Transmission Corp.*, 62 FERC ¶ 61,015, at 61,124 (1993) (approving recovery of "pricing differential" costs); *Williams Natural Gas Co.*, 64 FERC ¶ 61,165, at 62,426-27 (1993).

[16] *Texas Eastern Transmission Corp.*, 62 FERC ¶ 61,015, at 61,124 (1993).

[17] *Williams Natural Gas Co.*, 64 FERC ¶ 61,165, at 62,426-27 (1993).

[18] *Williams Natural Gas Co.*, 62 FERC ¶ 61,261, at 62,762 (1993) (approving *Texas Eastern* style pricing differential mechanism for WNG); *Texas Eastern Transmission Corp.*, 62 FERC ¶ 61,015, at 61,125 (1993) (imposing initial two-year limit on price differential mechanism).

[19] *Williams Natural Gas Co.*, 71 FERC ¶ 61,335 (June 14, 1995), *order granting and denying reh'g*, 73 FERC ¶ 61,367 (Dec. 22, 1995).

Contracts do not threaten the long-term future of the FERC's restructuring initiative.

CONCLUSION

For the reasons given above, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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